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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

The state accepts defendant's statement of the case with the addition of the supplemental statement of facts.

Summary of Argument

The trial court properly denied defendant's motion for judgment of acquittal on the kidnapping charge. The evidence, viewed in the light most favorable to the state, showed that defendant "secretly confined" the victim in a place where she was not likely to be found. The happenstance that some neighbors in this motel heard defendant's threats of rape, saw defendant with a "mean" look on his face, and saw him reenter the motel room with a rope alerted them to the possibility of crimes — without that information, it is highly likely that defendant would have secretly confined this victim for even a longer period of time. Other people, just outside the open window of the motel room, did not hear defendant beating this victim or hear her screams until just before she jumped out of the second story window.

The trial court acted within its discretion when it did not permit defendant's expert witness to opine whether the officer's comment concerning the rope appearing to be a snake was a symptom of the victim's methamphetamine use. The offer of proof showed the expert thought that a kidnapping and attempted rape could create the same emotional reaction to a rope. If exclusion of his evidence was error, it was harmless.

The trial court properly excluded evidence from two bartenders that the victim had "hustled" drinks from other male customers in their bars. This evidence lacked any relevance to the issue of defendant's guilt on the "secret confinement" kidnapping, sexual abuse, attempted rape, coercion, menacing, and assault charges. However, if there was

some relevance, it was minimal, and the trial court acted within its discretion when it determined the evidence would not be admitted.

Defendant's sentence pursuant to Measure 11 was proper, and that act has been held to be constitutional.

Supplemental statement of facts

Defendant argues that this case was simply a "credibility contest." (App Br 6, 42, 48). The state disagrees with that characterization and it offers this supplemental statement of facts.

The victim, [redacted] was 35 years old at the time of the trial and was living at the Willamette Valley Treatment Center for her methamphetamine problem. (Tr 94-96). In June of 1995, [redacted] had broken up with her boyfriend and was homeless. (Tr 97). She was staying with friends in and around the Toledo and Newport areas. (Tr 97-98). She came into Newport on June 28 because she wanted to talk to her former husband. (Tr 98-99). She had used some methamphetamine the day before, but she did not use any that day. (Tr 100). She also had not had any alcohol that day. (Tr 101).

[redacted] went to the Anchor Bar, because it was near her former husband's work place, arriving there just before 6 p.m. (Tr 101-02). She used the pay phone at the bar to telephone him, but he was busy and could not meet her. (Tr 102). [redacted] had two dollars and some change, and walked up to the bar to turn in her change for a dollar bill. (Tr 102). The bartender counted out the change and found only 85 cents. (Tr 103). Defendant walked up and offered her some money. (Tr 103). [redacted] took 15 cents from defendant, and got another dollar bill from the bartender. (Tr 103). She put her three dollar bills into a poker

machine. (Tr 103-04). Defendant came up behind her and put in additional money. (Tr 104). Defendant started talking to [redacted] telling her that he was working on a construction crew building a hotel. (Tr 105). He offered to buy [redacted] a drink, and she accepted. (Tr 105). When [redacted] finished playing the money in the poker machine, she took her drink and sat at a table; defendant came over and asked if he could sit with her. (Tr 105). Before this, defendant had been talking to a friend at a nearby table. (Tr 106).

Defendant continued talking to his friend, and told [redacted] he needed to drive his friend to Lincoln City. (Tr 106). He said that he did not want to go by himself, and asked [redacted] whether she wanted to come along. (Tr 106). Defendant continued to urge [redacted] to come with them, and then said that he would buy her dinner and take her to the casino in Lincoln City. (Tr 107). [redacted] considered the offer because she did not have anything to do. (Tr 107). Defendant looked like he was having fun and he appeared to be safe. (Tr 108). She accepted his invitation to dinner and the casino. (Tr 107-08).

It was a hot day, and [redacted] told defendant that she needed to get cleaned up before they went to dinner. (Tr 109). Defendant suggested that they go to his place, since he had to make some telephone calls anyway. (Tr 109). He said that she could take a shower there. (Tr 109). [redacted] thought they left the Anchor at 6:30 or 6:45. (Tr 110). She had three or four drinks, but she was not drunk. (Tr 111). Defendant was obviously intoxicated, but he was not "falling down drunk." (Tr 111).

When defendant, his friend, and [redacted] left the bar, the friend opened the car door and "heat just barrelled out." (Tr 111). Defendant's friend said he would meet defendant and [redacted] later. (Tr 112). The plan still was to go to dinner and the casino. (Tr 112).

Defendant drove [redacted] to pick up some clothes she had left at a friend's house, and then stopped at a store where defendant got some cigarettes and some beer. (Tr 113). They drove to the motel where defendant was renting a room while he was in town for the construction job. (Tr 113). The motel room was very hot, so [redacted] asked if she could open the window. (Tr 114). Defendant agreed. (Tr 114).

The telephone rang, and as defendant was talking, [redacted] went through her clothes, trying to find something to wear to dinner. (Tr 114). She put the clothes she was going to wear over a chair, and put her other clothes back. (Tr 115; ex 5, 6). [redacted] heard defendant tell the person on the phone that he had a "pretty little gal here in the room with him," but then he told the caller "No, no, I won't." (Tr 115).

When defendant got off the phone, he started telling [redacted] that he was making $2,000 a week working construction, and that he had women all over the country who wanted him. (Tr 117). He told [redacted] that if she would "be his woman," she could have anything that she wanted. (Tr 117). She responded by telling him that she was going to get ready for dinner. (Tr 117). She excused herself to take a shower, forgetting to take her clean clothes in with her. (Tr 118).

She closed the bathroom door and started her shower, but as she was washing her hair, she looked up and defendant was standing there, staring at her. (Tr 119). She had not heard him come into the bathroom and he scared her. (Tr 119-20). Defendant told [redacted] that the people downstairs called and said that water was leaking through the floor. (Tr 120). [redacted] rinsed her hair and got out of the shower. (Tr 120). She dried off, put on her bra and underwear, and then realized that her other clothes were in the front room. (Tr

121). At that time, defendant walked into the bathroom again, and [redacted] put a towel around herself. (Tr 121). [redacted] has always been self-conscious about her body, in part because she has stretch marks and in part because she has been overweight. (Tr 122). She did not even feel comfortable displaying her body to her husband.[1] (Tr 122-23). [redacted] asked defendant to leave the bathroom, and he complied. (Tr 123).

[redacted] was concerned, upset, and angry at defendant. (Tr 124). She told him that she had to meet someone at 10 p.m., even though she had no one to meet, because she thought defendant was "being weird." (Tr 124). [redacted] walked out to the front room, and defendant was standing by her clothes. (Tr 125). She did not want to put on her clothes in front of him, and she did not want to go back into the bathroom, so she sat down on the couch with the towel still around her. (Tr 125). The towel actually covered more of her body than shorts and a top would. (Tr 128). Defendant continued talking — "he was rambling on and talking nonstop with that Texas twang." (Tr 126). [redacted] had a sore on her cheek that was irritated, and she needed to cover it, so she sat down with a mirror that defendant had provided to put on makeup. (Tr 127-28). The sun was shining in her eyes, so [redacted] asked defendant to close the curtain in front of the window. (Tr 127). He did so. (Tr 127).

As [redacted] sat there, defendant said he believed that women actually wanted to be raped. (Tr 129). [redacted] said that she did not believe that women liked to be raped, but

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[1] [redacted]'s former husband testified that [redacted] was always very self-conscious about her body during their marriage. (Tr 333-34).

defendant kept saying that women did. (Tr 129). He handed her part of a letter to read, and said that he had a girlfriend who liked to be raped. (Tr 129). The letter said in part:

> To be honest, I'm into pain here and there. I'd love to be spanked. Baby, everything I write you in my fantasies is what I want to come true. I want you to tie me to a tree branch and more.

(Tr 134; ex 4). The letter was written by a woman in the Florida Correctional Institution. (Tr 134). The letter had two red lipstick mouths; by the closed lips, the woman wrote: "Kiss me baby. These are your lips only." (Tr 135; ex 4). By the open ones, she wrote: "Put your [redacted] between." (Tr 135; ex 4).

After seeing this letter, [redacted] told defendant again that she did not believe that women want to be spanked and raped. (Tr 135). Defendant acted irritated and agitated, and [redacted] was starting to get nervous. (Tr 136). "I could tell he was pissed off that I wasn't buying his ideas on women and what they wanted." (Tr 136). She wanted to "lighten things up," so suggested that he get the Johnny Cash tape they were listening to from the car. (Tr 136). However, as defendant left the room to get the tape, he told [redacted] "I might just get a rope and tie you up and rape you." (Tr 137). [redacted] thought he was just "a weird guy" and not serious. (Tr 137). When he left, [redacted] tried to finish her makeup, but defendant was gone just a short time. (Tr 138).

Defendant came back into the room and "plopped" down beside [redacted] (Tr 139). He grabbed her foot; [redacted] looked down and saw that defendant had put a rope with a slip knot around her ankle. (Tr 140). Before she could say anything, defendant grabbed both of her hands and bent her over the arm of the couch. (Tr 140). She was thinking that she was in a lot of trouble, but all she said was that defendant was hurting her hands so that she

could not feel her fingers. (Tr 140-41). "Then he -- with his open hand he slapped me really hard and really fast." (Tr 141). [redacted] looked at defendant, and he smiled. (Tr 141). He punched her four times in her face. (Tr 141-42). [redacted]'s nose felt like it was broken and bleeding. (Tr 142). She could taste blood in her mouth. (Tr 142). She thought that she stayed conscious but she was not sure. (Tr 142).

Events seemed to move very fast. (Tr 142). [redacted] started to scream, and defendant put his hand over her nose and her mouth to stop her. (Tr 142). She could not breath and she got dizzy. (Tr 142). Her scream was more like a squeal. (Tr 143).

> I remember being dizzy. And I remember -- I remember him hitting me. And I don't know. It was like all of a sudden I had no clothes on.

(Tr 143-44). As defendant started to let up on [redacted]'s mouth a little bit, he talked to her:

> I'm going to break your jaw. If you scream again I'm going to break your jaw. Do you understand me? I am going to break your jaw.

(Tr 144). [redacted] believed him and stopped screaming. (Tr 144-45). Because she was not screaming, defendant let her up so she could breath. (Tr 145). Defendant picked up a towel and wiped [redacted]'s face. (Tr 147). His voice changed so he was no longer "this Texas good old boy" -- his voice was now "very low, very slow and very -- very slow and very low and very deep." (Tr 147).

> He told me he was going to rape me, but that he would be very gentle.
>
> And he looked down at my breast and he kissed the [redacted]
>
> And he looked at me.
>
> And I will never forget in my whole life the look in this man's eyes.
>
> And he said to me, "I think I'll put you in the ocean. Yeah. I'll put -- I'm -- I'm going to put you in the ocean."

Q: Okay and then how you respond to that?

A: He looked at my breast again and I just — I— I— I knew with every fiber of my body that the man was going to kill me. I knew he was going to kill me. And I knew that he meant everything that he said.

And I started screaming again.

(Tr 145-46). [redacted] rolled off the couch, still screaming, because she knew defendant was going to kill her. (Tr 148).

I rolled off onto the floor over the couch. And I got loose and I rolled off onto the floor off the couch. And I got — I rolled off onto the floor off the couch.

And he — he grabbed the rope and he kept putting it around my neck.

And I kept pulling it off.

And he kept putting it around my neck.

And I kept pulling it off.

And he started punching me in the back of my neck over and over. And he was going to break my neck.

(Tr 148-19). [redacted] was able to make her way to the door and she tried to get the door open. (Tr 150). Defendant hit her hands and her hands came loose from the doorknob. (Tr 150). [redacted] was screaming again, so defendant put his hand over her mouth. (Tr 150). She continued trying to open the door, but it was locked. (Tr 150). Defendant kept hitting her. (Tr 150). Using the rope, defendant pulled her back into the middle of the room. (Tr 151). Suddenly [redacted] remembered the open window and she went through it. (Tr 151). Defendant pulled her back by her hair; but she was able to bite him, and he let go of her. (Tr 151-52). She jumped out the window without looking. (Tr 152). She was stark naked

with a rope around her leg, but she did not look before she leaped because she knew defendant was going to kill her. (Tr 153).

Edward Sellinger, along with his fiancee, rented the motel room that was "catercorner" to the door to defendant's room. (Tr 194). The walls of the apartments allowed a person to hear things in the adjacent rooms "really clearly" even with the doors closed. (Tr 195-96). On June 28, his friend, Michael Weber, visited him. (Tr 195). Sellinger and Weber were coming back from the beach, and as they were climbing the stairs, Sellinger heard a man's voice coming through the open door of defendant's apartment saying that he was not planning on using another person "for a piece of ass." (Tr 196). Martin heard a threat to rape someone, and a mention of a rope. (Tr 219). They went ahead and entered their apartment, and then left a short time later to go to the store. (Tr 197-98, 220). On their way, they saw defendant in the parking lot, getting out of his car, carrying a coarse, black rope like the one that the police took from [redacted]s leg. (Tr 198-99; 220-21; ex 1). Defendant had always appeared cordial before; this time he had a weird look — "just real mean." (Tr 199-200). Defendant did not say hello to Sellinger, which was unusual. (Tr 200).

Frieda Long, the manager of the motel, and her friend, Deanna Nobel, also saw defendant get the rope out of his car and take it up to his room. (Tr 271-72, 284-85). Dottie Barnes, a resident of the motel, was sitting with her door open because of the heat. (Tr 316-17). She had seen defendant arrive with a woman, and then return to get a rope from his car. (Tr 317). She thought it was about half an hour between the two events. (Tr 318).

When Martin and Sellinger returned from the store, about five minutes later, the door to room 10, defendant's apartment, was closed. (Tr 200-01, 222). Sellinger heard a man say, "I'm going to rape you." (Tr 201). The man sounded serious. (Tr 201). A woman's voice answered, "I need my leg back." (Tr 201). She sounded worried, scared, and angry. (Tr 202).

Weber did not hear anything immediately from the room, but after he sat down to watch television, he heard some screaming. (Tr 223). Both men heard a high pitched scream. (Tr 202). Sellinger said that the scream sent chills up his spine and it sounded like someone was dying. (Tr 202). Weber could not tell what the woman was saying, but she sounded terrified and hysterical. (Tr 223-24). Sellinger heard the woman plead for help. (Tr 203). He woke his fiancee and asked her to call the police and "tell them they had to get there right away." (Tr 203). He opened the door of his apartment and saw that the door of defendant's apartment was closed and then all of a sudden someone jerked on it from the other side and the door started going back and forth. (Tr 204). The knob was turning as if someone was trying to get it open but could not. (Tr 204-05). He heard another scream that became muffled all of a sudden, as though someone put a hand over the woman's mouth. (Tr 204-05). Immediately after the scream, there was a heavy thump, like somebody had been thrown back on the floor, and then a "bunch of crashes," like someone being pushed around or thrown around. (Tr 206). Weber said it sounded like people were fighting, and things were thrown against the wall; the screaming continued, but muffled. (Tr 225).

Sellinger and his friend thought about rushing in, but they did not know if the man had a gun. Sellinger described what happened next:

> It got real quiet. And I heard the door of Room 10 open. And I peeked out my door. And there was the man — the man was throwing clothes in a box.

(Tr 207). In addition to throwing the clothes into the box, defendant put in a pair of shoes. (Tr 208). Defendant was near the couch and not near the window when he was doing this. (Tr 214). Sellinger did not see the girl. (Tr 208). Defendant went downstairs. (Tr 209).

[redacted] remembered that when she went out the window, she landed on a roof and she was terrified. (Tr 153). She turned around to see if defendant was going to come after her; she saw him look out the window and she was terrified. (Tr 154). She was more concerned about being killed and thrown into the ocean than she was about being raped. (Tr 154). She looked down, and saw someone standing there, so she jumped and a man caught her. (Tr 155). She would have jumped even if no one had been there. (Tr 155). She remembered what she did after she landed:

> I ran and I hid. And — and — and I was not even human at this point.
>
> This man reduced me to less than a human. I was a broken, squealing, animal.

(Tr 155). She did not remember everything that happened next, but she remembered somebody covered her up, and she remembered a paramedic who stayed with her for a long time. (Tr 156).

Barnes, who had been sitting with her motel room door open, saw [redacted] go out the window head first with the rope around her neck. (Tr 318-19). Barnes had heard some screaming first, with [redacted] saying that "he was trying to kill her and snap her neck." (Tr 320). Barnes had only seen one other person look so terrified — that was her own daughter when she described being molested. (Tr 320).

Several people were in the motel parking lot to load a water heater onto a truck that evening. (Tr 234-35, 270-71). Phillip Gray heard intermittent screaming from the second story window. (Tr 235). About half a minute later, he saw a naked lady on the roof. (Tr 236). She was screaming, hysterical, and very frightened. (Tr 236). She had a rope attached to her ankles. (Tr 237). She moved to the edge of the roof like she was trying to escape, and then she came off the roof. (Tr 238). David Long half broke her fall and half caught her. (Tr 238). As soon as she landed, [redacted] ran off to a little partition by the laundry, saying "he's trying to kill me." (Tr 239). She said the same thing several times: "He tried to kill me. He's trying to kill me. Help." (Tr 237). Some woman came to help and put a blanket around [redacted] (Tr 239).

Deanna Noble had not noticed the woman until [redacted] was leaning out the window backwards and screaming. (Tr 272). Nobel thought this was five to ten minutes after she saw defendant get the rope from his car. (Tr 282). When she first saw it, the rope around the woman's ankle was taut rather than loose. (Tr 273). It looked like it was still attached to something inside the room. (Tr 273). Deanna Nobel testified about what happened next:

> It sounded like, "He's trying to kill me," and that she was screaming and she was really scared. And she was going to get off that roof and get away from him no matter what — however, she had to do it to get away.

(Tr 274). Noble thought that [redacted] was about 12 to 15 feet from the ground at this point. (Tr 276). Nobel saw defendant at the window after [redacted] came out of the window. (Tr 280).

Frieda Long also had not heard or seen anything unusual before she heard [redacted] screaming from the roof. (Tr 286-87). Frieda Long also said that [redacted] appeared

hysterical and very frightened. (Tr 287). She also thought that the rope looked like it was tight at first. (Tr 288). Frieda Long was running into the office to call the police when her son caught [redacted] (Tr 289). She was sure that [redacted] was going to jump even if no one was going to catch her and even though she would have landed on concrete. (Tr 289). Frieda Long also saw defendant at the window, standing there and looking out. (Tr 290-91). She initially thought [redacted] was going to kill herself, but then decided that she was scared to death. (Tr 300).

Frieda Long came back out after calling the police with a sheet to wrap around [redacted]. (Tr 291). [redacted] was lying in a feral position saying that he was trying to kill her. (Tr 291). She had blood around her mouth. (Tr 292). There might have been blood around her nose, too — "there was quite a bit of blood on her face." (Tr 293). At some point, [redacted] told Mrs. Long that she had just met defendant in a bar that day and other than that, she did not know him. (Tr 299).

Frieda Long's 18-year-old son David first heard a lady screaming "and suddenly she came out of the window." (Tr 302). She was in a hurry to get out of the window. (Tr 303). She was terrified — "She was, I mean, literally afraid for her life." (Tr 303). When she got on the porch roof, David Long was sure that [redacted] was going to jump whether he was under her or not. (Tr 304). Long held [redacted] for a minute, but she pushed away from Long and ran towards the corner of the motel behind the garbage cans. (Tr 305). Barnes came with a robe and covered [redacted] (Tr 305, 322). David Long remembered seeing blood come from both sides of [redacted]'s mouth, but could not tell if any blood was coming from her nose. (Tr 306, 312). Barnes asked [redacted] how she was — [redacted] said that her

neck was red and really hurt because the rope had been around it. (Tr 323). Barnes could see that [redacted] had a cut inside her mouth. (Tr 323). [redacted] told Barnes that defendant had tied her up and was going to kill her. (Tr 324). Barnes could see rope burns on [redacted]'s neck. (Tr 324). [redacted] did not calm down. (Tr 325). [redacted] never said that she wanted defendant arrested — she just wanted to get away. (Tr 327).

Gray saw defendant come downstairs carrying a box in his arm. (Tr 240). In addition to clothes, there were personal articles in the box. (Tr 242). David Long noticed a pair of shoes sticking out of it. (Tr 307). Defendant asked what was going on; he said, "I'm taking off. I'm getting out of here." (Tr 242). Defendant seemed to be in a hurry. (Tr 292, 308). David Long asked defendant what was going on; defendant answered: "She asked for it, so I gave it to her the best way I know how." (Tr 308, 314-15).

When Sellinger's friend Weber followed defendant downstairs, Sellinger stayed upstairs. (Tr 209). By the time that Weber got to the bottom of the stairs, the officers were there already and had defendant in custody. (Tr 226). When Sellinger came downstairs a few minutes later, defendant was sitting in the back of the police car. (Tr 209-10). Sellinger saw [redacted], "scrunched down" by the wall near the laundry room, and he could hear her sobbing. (Tr 210). Weber saw that [redacted] was hiding behind a wall. (Tr 227). "She didn't want to have nothing to do with anybody, just hysterical." (Tr 227). Weber did not try to get near her. (Tr 227).

Officer Howe was the first officer to arrive. (Tr 337). Defendant was sitting in the car, and he appeared to be getting ready to leave. (Tr 338). [redacted] still had the rope around her ankle. (Tr 339). When Officer Howe asked whether she needed medical help,

[redacted] was sobbing so much that she was not ready to answer; she finally said no. (Tr 339). Sergeant Bavaro spoke with [redacted] briefly, and then asked Officer Howe to handcuff defendant. (Tr 340). Howe patted defendant down and put him in the patrol car. (Tr 341). Defendant said that he had to get out of there. (Tr 341). Howe started questioning defendant and advised him of his rights. (Tr 342). The officer noticed that defendant "was just covered in sweat virtually, just very clammy feeling and sweaty." (Tr 353). The officer thought defendant had engaged in some physical exertion. (Tr 353). Sergeant Bavaro noticed that defendant was "real agitated. He was what I would describe as bouncing — bouncing around, moving real fast, acted real nervous, real upset." (Tr 372).

Defendant told Officer Howe that he met [redacted] in the Anchor Lounge and bought her a couple of drinks and gave her some money for the video machine. (Tr 342). Defendant told the officer that he and his friend were going to Lincoln City, and they invited [redacted] to come with them. (Tr 342). There was some problem with the roommate getting in defendant's car, so just defendant and [redacted] were going. (Tr 342). Defendant said that [redacted] agreed to go to his room first after they picked up her bag at a friend's house and he picked up some beer at the store. (Tr 342-43).

Defendant told Officer Howe that they were sitting in his room, drinking beer, and after about 15 minutes, [redacted] spontaneously took off her top. (Tr 343). He agreed to let her take a shower. (Tr 343). He said that he noticed water coming from under the bathroom door, so he went in there and was mopping up water with a towel when [redacted] came out of the shower and started to dry herself off. (Tr 344). Defendant said that this was the first time he had seen her totally nude. (Tr 344-45). Defendant told the officer that

after [redacted] dried herself off, she came into the other room, opened the hide-a-bed, and laid down on it, completely nude. (Tr 345). He said that they were discussing sex and she told him that she wanted him to tie her up and make love to her. (Tr 346). "And he said, well, he thought it was a little kinky. But he figured, what the heck." (Tr 346). Defendant got a rope from his car. (Tr 346). He said that he did not lock the door when he returned to the room. (Tr 347). He said that they were talking about what they intended to do, and he started to tie the rope around her ankle. (Tr 347).

> At that point he said she started screaming and screaming from one to two minutes.
>
> Then she got up and went over to the window and climbed out.

(Tr 347). Defendant said that he did not know why [redacted] did not use the door. (Tr 348). Later, he said that he had locked the door so his roommate would not come in. (Tr 348). During this first story, defendant did not indicate that [redacted] had asked him for money in return for sex. (Tr 349).

Officer Howe compared notes with Sergeant Bavaro and then started talking to defendant again. (Tr 349). Defendant's second story was almost identical to his first story, and again defendant did not mention that [redacted]ad asked for money from him for sex. (Tr 350). Officer Howe again checked with the sergeant, and questioned defendant for a third time. (Tr 350). "The third time the story was pretty much the same except for the part about the money." (Tr 351). He said, "Oh, yeah. She asked — she asked for $200 to have sex. And I wouldn't give it to her." (Tr 351). Officer Howe that this remark sounded "like a spur-of-the-moment thought on his part." (Tr 351). When the officer asked why

defendant had not mentioned this in the first two accounts, "he told me he didn't think about it the first two times." (Tr 353).

Sergeant Bavaro could hear [redacted] before he saw her:

> She was screaming and crying with just big heaving sobs. She was what I would describe as hysterical. And in my opinion she was terrified, just in a terrified state.

(Tr 373). In his 19 years of experience as a police officer, Sergeant Bavaro had never seen any one in that state. (Tr 374). The sergeant noticed that [redacted] had blood flowing from her mouth, and her nose was red and looked swollen. (Tr 374). [redacted] would not let the officer get close to her, but she would answer some questions if he stayed a distance away. (Tr 375). She let a woman stroke her hair and hold her. (Tr 375). The crowd told the officer that defendant had assaulted [redacted] and thrown her out of the window; [redacted] corrected them, saying that she had jumped out the window to get away from defendant. (Tr 376). She said that she had jumped because defendant was going to kill her. (Tr 377).

Sergeant Bavaro described her:

> She had a rope around her ankle when I arrived. And when I went back to contact her she looked down at the rope and she started shaking her ankle and screaming for it to get off, like it was, like, some serpent crawling up her leg or some monster or something.
>
> And I had one of the people in the crowd — they asked me if they could untie it off her leg. And I told them to go ahead and take it off her leg. Obviously, it was causing her a lot of terror.

(Tr 377).

Defendant was transported to the police station. (Tr 355). Officer Howe stayed when Detective Etter interviewed defendant. (Tr 355). While they were waiting for the detective, defendant told Officer Howe that he had a girlfriend who liked to be abused during

sexual relations, and "that once he finally gave her what she wanted, at that point he couldn't keep her away from him anymore. She followed him around like a little kid." (Tr 356). Defendant said that he had been planning to have sex with [redacted]. (Tr 357). When Officer Howe wrote his report, he noted that the victim had been "molested"; he put this information in his report because his sergeant said that [redacted] "was pretty badly bruised up." (Tr 367).

Detective Etter taped his interview with defendant and this tape was played for the jury. (Tr 399; ex 2). In this interview, defendant repeatedly said that [redacted] stripped completely naked shortly after they arrived at the motel room. (Tr 401; ex 2). He said he picked [redacted] up and that his original plan was to take [redacted] and Gene, his roommate, to Lincoln City. (Tr 402; ex 2 at 95-170). Defendant said a number of times that they would not find any marks on [redacted] because "he never touched her." (Tr 402; ex 2). He also described her exit from the motel room repeatedly — that [redacted] said she was "into pain," but when he put the rope on her leg, [redacted] asked for $200, and when he said that he did not have that much money, "She started screaming and went and jumped out the [redacted] window," "she went to hollering and screaming and jumped out the [redacted] window," "she went and jumped out the [redacted] window just like she had it planned," "she hollered and screamed and jumped out the [redacted] window," and "she jumped up from the mother [redacted] couch with that rope tied around her leg and jumped out the [redacted] window." (Ex 2 at 379, 706, 819, 1005). Defendant said that [redacted] took the rope out the window with her because "She wanted that rope to prove I was wrong." (Ex 2 at 1108). He suggested a motive for [redacted]'s behavior: "She wanted to blackmail me. That's the whole goddamn story." (Ex 2 at 2297).

Nancy Bohlman, a registered nurse who worked in the local emergency room, remembered that [redacted] told her that someone had assaulted her and she jumped from a second story window. (Tr 249). She added that "she had met this guy and that she was getting ready to go out to eat. He was going to take her out to eat." (Tr 249-50). She was hysterical and tearful, and kept saying, "He tried to kill me. He tried to kill me. I can't believe he tried to kill me." (Tr 250).

The nurse observed that [redacted] had bruising to her left shoulder, discoloration around her foot and the back of her neck. (Tr 250). [redacted] complained of pain to her left facial area, and said she was struck on the head and the neck. (Tr 250). She did not appear to be under the influence of alcohol or drugs. (Tr 251-52). If the nurse had thought [redacted] was under the influence of drugs, she would have ordered a drug screen. (Tr 252). The nurse had seen the bruising on [redacted]'s arms, and [redacted] admitted candidly she was an IV drug user. (Tr 252-53). The nurse could tell that the bruises were older; she saw no fresh IV puncture wounds on [redacted] even though she examined her forearms for a couple of minutes. (Tr 253, 256, 257). Although the nurse had seen people under the influence of methamphetamine before, she had never seen someone hysterical because the person was under the influence of that drug. (Tr 255-56).

The marks on [redacted]'s ankle were consistent with a ligature mark from a rope and consistent with the history that [redacted] gave. (Tr 266-67). The bruising on her neck would have been consistent with either blows to the neck or abrasions from the rope. (Tr 267). Detective Etter took photographs showing [redacted]'s injuries. (Tr 408-09; ex 10, 11, 12, 13, 14). The officers found blood spots on the window sill of defendant's room. (Tr 380; ex

15, 16, 17, 18, 19). They also found blood on a towel on the coffee table. (Tr 386). The hide-a-bed was not open; in fact, Sergeant Bavaro did not know that a hide-a-bed was in the room. (Tr 387). Detective Etter seized several letters, including the one that [redacted] remembered with the lipstick marks, and another similar one. (Tr 402-03; ex 3, 4). Detective Etter took the photographs showing [redacted]'s clothes neatly draped over a chair. (Tr 407; ex 5, 6).

After the police released the motel room, Mrs. Long, the manager, saw that the room was "all messed up, you know, like there was an argument, people running around in there. And the bed had blood on it." (Tr 293). There was also blood on a couple of towels. (Tr 294).

Before trial, the state argued that evidence of the victim's drug use in the past was irrelevant and should be excluded, in part because defendant never claimed [redacted] was high on drugs at the time of the crimes. (Tr 6-9). Defense counsel argued that the victim's drug use "is an essential element of the defense of this case" and it would be admissible as proof of motive. (Tr 10-11). He also argued that [redacted]'s drug use was admissible to show her plan to hustle defendant for money. (Tr 11). The prosecutor argued against the admissibility of this evidence, but the judge ruled in defendant's favor:

> Okay. The Court will allow evidence of intravenous drug use. I think clearly in this type of case goes beyond even character. It's a physical fact that carries some long-range conduct consequences if, in fact, she's using.
>
> And you can — the State's admitted that she was an IV user. That doesn't make the defendant's theory of what happened factual, but it certainly gives the defendant the opportunity to use that information.
>
> And Mr. Black has indicated he would — and he would even have an expert, Dr. Cookson, who is a pathologist with a good reputation in this

> community. And I know that Dr. Cookson knows methamphetamine conduct. He's certainly dealt with a number of people involved in it over the years. So his expertise — if the defense is that she was on meth and was out of control and that her conduct was something that is different than the State's theory of the case, that's totally relevant to these proceedings, and I'm going to allow it.

(Tr 16-17).

At trial, the prosecutor asked [redacted] why she did not get dressed after she finished her shower:

> I didn't want to get dressed in front of him. I didn't want to stand there and get dressed in front of him.
>
> Q: Okay.
>
> A: I don't know — you know, I don't know. I wish — I don't know. I — I have asked myself a million times why I didn't.

(Tr 128). At trial, [redacted] admitted that she went to the motel room to get cleaned up and get a free meal, but she denied asking defendant for money, or offering to trade sex for money. (Tr 156). [redacted] said that defendant's attack on her would affect her for the rest of her life. (Tr 157).

During the first part of his cross-examination of the victim, defense counsel asked [redacted] whether she had ever hustled men for money; the court sustained the prosecutor's relevance objection. (Tr 164-65). Defense counsel wanted to ask [redacted] whether she had ever been asked to leave a local tavern or bar; the judge restricted the question to the Anchor Bar. (Tr 165). [redacted] said she had not been asked to leave that place. (Tr 165). She said that she had never injected methamphetamine any other place but her arms. (Tr 165). [redacted] agreed that she had injected methamphetamine about 24 hours "before this event" and that she had injection paraphernalia in her purse. (Tr 171). [redacted] agreed that she did not

have money to pay for her dinner and she expected defendant to buy her dinner, even though she only knew him an hour and a half. (Tr 174). In terms of makeup, [redacted] said that she was putting on foundation and blush, but she had taken all of her makeup out of her purse and put it on the coffee table. (Tr 176).

[redacted] said that she was not sure whether she drank a beer in defendant's room: she thought defendant might have offered her one, and opened it for her. (Tr 178). She could not remember whether she told the hospital that her nose was broken, and she never got back the clothing she was wearing. (Tr 179). [redacted] denied that she ever asked defendant for $200. (Tr 179). She said that methamphetamine does not cause her to hallucinate or make her paranoid. (Tr 181). She was sure that she did not still feel any effects of the methamphetamine that she had injected the day before. (Tr 183). She was also sure that she did not ask for money from defendant at the bar. (Tr 184). On redirect examination, [redacted] explained again why she was going out with defendant:

> You know, he said — he said he wanted some company. He needed — wanted some company.
>
> And it was a free meal. It was a free meal and something to do.

(Tr 189). On recross-examination, defense counsel asked [redacted] why she stayed in the motel room when defendant said he was going to get a rope and tie her up:

> No. I — I didn't — my mind didn't even work like that. I mean, I just thought — this guy — he talked nonstop. He never stopped talking. That — he just — he talked, talked, talked.
>
> And he was — I just thought he was full of baloney. I mean, I just — I didn't even take him seriously. He was weird.

(Tr 191). When defense counsel asked why she did not leave at that time, she could not explain.

> I have asked myself that a million times.
>
> I don't know. I — I never — I didn't know people did things like this.
>
> In my mind — I have never had somebody tie me up and rape me. I did not know that — he was just talking all the time. He — he talked.
>
> I just — I didn't — I didn't have any idea.

(Tr 192).

The state offered photographs showing the window that [redacted] went through. (Tr 382; ex 24, 25). At trial, Sergeant Bavaro agreed that people who are under the influence of methamphetamine sometimes act "weird." (Tr 390). Both the sergeant and the detective could not recall if [redacted] was wearing makeup. (Tr 395, 418-19).

Defendant, 56 years old at the time of trial, testified that after work he and his roommate had a few beers and then went to the Anchor. (Tr 438-40). He said that he met [redacted] as she was playing the video poker machine; she asked him for money and he gave her some money. (Tr 441). He said that he did not buy her any drinks, and he did not see her drink anything. (Tr 442). He said that when his roommate decided not to go to Lincoln City, he decided not to go either. (Tr 442). He said he had a case of beer at the room. (Tr 442). He said that he had never offered to buy [redacted] dinner. (Tr 442). He said that he told her that he had just gotten back from the grocery store, and he was going to go home and fix dinner "because I didn't have a whole lot of money to be going out and taking somebody out to a dinner." (Tr 443). He said they went to get [redacted]'s backpack after

they spent a long time looking for it in the bar. (Tr 443-44). He thought they left the bar about 5 p.m. (Tr 444).

Defendant said that when they arrived at the motel he opened a beer for himself and did not offer one to [redacted]. (Tr 445-46). He said that his wife called him and he talked to her for some time. (Tr 446). He said that as he talked, [redacted] went through the clothes in her backpack, throwing some around, and then she went in to take a shower. (Tr 448-50). He said she came out of the shower naked. (Tr 451). She left a lot of water on the floor, and he cleaned up after her. (Tr 451). He said after a while, [redacted] moved and lay down on the couch. (Tr 452-53). The subject turned to sex:

> She has asked me for — if I was going — if I wanted to tie her up. And I told her — we was talking about the letters and everything that she had seen there.

(Tr 453). Defendant said he agreed to tie up [redacted], drank a little more beer, and went downstairs to get his rope. (Tr 455). He said that he put the rope very loosely around one leg: "And I reached up to get ahold of one of her hands. And she went — she told me she wanted $200." (Tr 456). Defendant said that he had only $12 in his pocket, and that he could not give her $200. (Tr 456). But [redacted] "went to hollering and screaming she had to have $200." (Tr 456). "She said she had to meet a fellow to buy — to pay her — for her fix." (Tr 456). He was very sure about this statement. (Tr 456). He explained why he did not tell the officers about this plan of [redacted]'s:

> I remembered it all the time, but I didn't want to tell about her wanting the $200 or the — wanting the fix or anything. I didn't want to get the girl in trouble either.

(Tr 457). [redacted] said that she needed the money, and was hollering and screaming. (Tr 457). Defendant said he put his hand over her mouth because he did not want to be thrown out of the motel. (Tr 457). He said he hit her "lightly" with his right hand. (Tr 458). "Whenever I slapped her she jumped up and run around the end of the coffee table and jumped out the window." (Tr 458). He said that [redacted] had not touched the door knob at all. (Tr 458). He thinks the door was open at that time. (Tr 459). He said that [redacted] stepped on his box with laundry in it and then went out the window, head first. (Tr 459). He described what he did next: "I took the rope over and I went over there to get — to get her back in the house." (Tr 460). He said that he threw the rope out the window. (Tr 460). Defendant said that he put his clothes back into the box and carried the box downstairs, in part to find out what happened to the woman. (Tr 461-62). Defendant admitted that he was intoxicated at the time. (Tr 462).

On cross-examination, defendant admitted several felony convictions. (11/3 Tr 27).[2] Defendant said that he had given the 15 cents to [redacted], and [redacted] asked for the money for the poker machine. (11/3 Tr 29-30). He said that he probably asked whether she was married — "That's the first thing I usually ask a lady, if I meet one, if she's married or not." (11/3 Tr 30-31). He thought that his roommate asked [redacted] to come with them to Lincoln City. (11/3 Tr 31). He said that he did not ask [redacted] to go out to dinner with him, but he invited her to have dinner with him at his house. (11/3 Tr 32). He said he only

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2 The court reporter left the courtroom to give a demonstration, and parts of the record from this morning were electronically recorded.

had eight to ten dollars in his pocket. (11/3 Tr 33). When defendant was asked whether he mentioned going to the casino, defendant replied:

> No, sir, but the Anchor wouldn't even serve me a beer, I was too intoxicated, ain't nobody else going to serve me one.

(11/3 Tr 34). Defendant conceded he had promised to drive his roommate to Lincoln City. (11/3 Tr 34).

Defendant said that he did not stop for beer on the way to his motel room because he already had a case at home. (11/3 Tr 35). He said that [redacted] threw around clothes from her pack, and then took off her bra and blouse. (11/3 Tr 35). After that she went in to take a shower. (11/3 Tr 36). He said that he had not mentioned the way [redacted] undressed during his direct examination, because his attorney did not ask him. (11/3 Tr 36-37). He said that he had not told the detective that [redacted] had stripped "stark naked" in the living room before she took a shower, even though he agreed that was his voice on the tape. (11/3 Tr 37). When the prosecutor read that portion back to defendant, defendant had an explanation:

> If I said that it was a false statement at that time, because I was drunk. Because she did not pull all of her clothes off before she went into the shower.

(11/3 Tr 38). Defendant said that in the portion of his statement when he discussed [redacted] stripping off all of her clothes, "stark naked, running around in front of me," he meant she was naked except for her shorts. (11/3 Tr 39). He said that after she came out of the shower, [redacted] was again "stark naked." (11/3 Tr 40-41). He denied that [redacted] opened the hide-a-bed, or that he ever told anyone that she had done that. (11/3 Tr 41).

Defendant conceded that [redacted] read the letter in his motel room; he said that she indicated that she liked some pain, and also indicated the opposite. (11/3 Tr 47-50). He said that the only time he hit [redacted] was when he slapped her in the mouth to try to get her to stop screaming. (11/3 Tr 51). He thought the injuries on her neck were caused by her jump onto the roof. (11/3 Tr 52-53). He said that over half of the women that he meets in bars have fantasies about forcible sex with a "little pain." (11/3 Tr 54-55). Defendant explained why he did not tell the officer that [redacted] might have wanted the $200 for drugs:

> I might have given him that theory at that time because I didn't want to get the girl in trouble for buying dope. And I know she was doing dope, because you could see the marks on her arm. She told me she was doing dope, she had some with her. I was trying to scare him away from catching her with dope in her purse.

(11/3 Tr 56-57). He also talked about [redacted] screaming:

> Q: Now, you heard these people testify that they heard [redacted] screaming; correct?
>
> A: Right.
>
> Q: How many times did you tell [redacted] that you didn't have $200, when she started screaming?
>
> A: Five or six times.
>
> Q: Did you say it loud enough so she could hear you over the screaming?
>
> A: I would think so, yeah.
>
> Q: Five, six times total?
>
> A: Um-hum.

(11/3 Tr 57).[3] Defendant said that the door was not locked at this time; in fact, he said he thought he did not even close it when he returned from getting the rope. (11/3 Tr 57-61). He said that he had no idea why [redacted] would head straight for the window and jump out unless "she was going to get me in trouble if I don't pay her the $200." (11/3 Tr 61). He could not explain how that plan would work or why [redacted] would want the police to come when she had drugs in her purse. (11/3 Tr 61).

He said that he went downstairs "basically to see about her" but also to do his laundry. (11/3 Tr 61-62). He denied telling David Long that "She asked for it." (11/3 Tr 63). In fact, he denied even talking to Long. (11/3 Tr 63). He said that he never said "I'm going to rape you" because "she went up there with — in the motel room with me, to give me sex." (11/3 Tr 64). He denied pushing Wright's hand from the doorknob, and he denied telling Phil Gray that he was "taking off" and "hitting the road." (11/3 Tr 65). He agreed that he told the officers that he "never put a mark" on [redacted] (11/3 Tr 67-68). He said that when he slapped Wright, it should not have left a mark — "I just did that to try to get her attention where she'd quit screaming." (11/3 Tr 68). He conceded that he told the detective that he never laid a hand on her, but said that the detective did not ask him whether he had "smacked" her in her mouth. (11/3 Tr 68).

Defendant presented expert testimony from Dr. Cookson, who discussed the possible effects of methampheramine use. (Tr 465-73). Defended also presented evidence from Mary Flansberg, a bartender from the Anchor. (11/3 Tr 20). Flansberg said she heard defendant

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[3] The neighbor, Sellinger, never heard defendant talk about $200 or heard any amount of money mentioned from defendant's room. (Tr 209).

tell his roommate that he had money at his motel. (11/3 Tr 21). Hansberg said that after this conversation, [redacted] walked over to defendant. (11/3 Tr 22). She did not know whether defendant put money in the poker machine for [redacted] and she did not know whether defendant bought drinks for [redacted] (11/3 Tr 22).

ANSWER TO ASSIGNMENT OF ERROR NO. 1

The trial court properly denied defendant's motion for judgment of acquittal on the kidnapping charge.

ARGUMENT

Defendant contends that the trial court erred when it denied his motion for judgment of acquittal on one of the kidnapping charges. Defendant's theory was that the state failed to prove the element of secret confinement because defendant had a roommate, the motel room was not "far away in the woods" and the walls were thin. (Tr 422-23; App Br 24-25). The trial court properly concluded that the evidence was sufficient on this element to be given to the jury.

In reviewing a trial court's denial of a motion for judgment of acquittal, this court views the evidence in the light most favorable to the state, including all inferences that reasonably can be drawn from the evidence. *State v. Cervantes*, 319 Or 121, 125, 873 P2d 316 (1994). The question here is whether the state presented sufficient evidence so that a reasonable trier of fact could have found that defendant secretly confined [redacted] in a place where she was not likely to be found. ORS 163.225(1)(b). The state presented sufficient evidence. Defendant's motel room was such a place, just as the victim's bathroom was such a place in *State v. Montgomery*, 50 Or App 381, 624 P2d 151, *rev den* 290 Or 727 (1981).

rope, and by noticing his general unfriendliness in the parking lot. Occupants of the rooms on either side of defendant evidently heard nothing. In addition, none of the people in the parking lot heard [redacted]'s screams for help, or the noise of defendant knocking [redacted] around, until immediately before [redacted] went out the window, even though the window was open throughout the altercation.

Defendant argues that as soon as defendant tried to restrain [redacted], neighbors heard her screams. (App Br 27). Of course, had those two neighbors remained down on the beach for another few minutes, neither they nor anyone else would have heard [redacted]'s screams. Also, defendant did not know that the neighbors were in the motel room near his, since when he last saw them, they were walking away from the motel toward the store.

Defendant repeats this same assertion when he states that the neighbors "immediately" knew that the victim was being assaulted. (App Br 27). More correctly, two people heard some of [redacted]s early screams. In point of fact, though, those first screams did not lead either man to believe that defendant was assaulting someone or confining someone secretly. Mr. Weber talked about hearing a "real hysterical, terrified, high-pitched" female scream; the prosecutor asked what he did next:

> I brought it to Ed's attention.
>
> They were arguing or fighting or something next door. And we didn't think anything of it.
>
> Q: You didn't think anything of it?
>
> A: Well, I guess — from what I understand, there has been some parties going on next door, and Ed had said that it — that there was no need to worry. They was probably just arguing or something.

(Tr 223). Thus, even though the neighbors immediately heard the screaming, they did not immediately know that defendant was assaulting [redacted] and refusing to let her leave the motel room. Indeed, if [redacted] had not jumped through the window, who knows how long her confinement would have lasted. Defendant points to no caselaw that says a kidnapping must have an expected lifetime of three hours, or thirty minutes, or even three minutes. The issue was whether a reasonable finder of fact could have found that the state proved the element of secret confinement under these facts. Viewing the evidence in the light most favorable to the state, the standard was easily met. The trial court properly denied defendant's motion for judgment of acquittal on this theory of kidnapping.

Defendant argues about the proper remedy, insisting that if this court agrees with him, it must vacate the kidnapping conviction and cannot remand the case for resentencing, notwithstanding other cases in which this court entered convictions for lesser-included crimes or remanded the cases for resentencing following the vacation of a conviction. (App Br 28-31). Whatever the merits of defendant's arguments might be, and none are apparent, the issues about the proper remedy need not be addressed. The evidence was sufficient for a reasonable juror to find that defendant was guilty of this kidnapping charge, and the trial court would have erred as a matter of law if it had granted defendant's motion for judgment of acquittal.

ANSWER TO ASSIGNMENT OF ERROR NO. 2

The trial court properly excluded evidence from an expert defense witness.

ARGUMENT

Defendant argues that the trial court erred when it excluded evidence from his expert witness. He argues that his expert should have been allowed to consider a comment by a police officer that the victim was acting "as if the rope was some sort of terrifically terrible monster crawling up her" and opine whether "that would be a symptom or indication" that the victim was under the influence of methamphetamine. (App Br 31). He contends that the applicable statute is OEC 703, concerning the quality of facts relied on by an expert, that he was improperly precluded from asking this question, and the improper preclusion prejudiced him greatly. (App Br 34-37).

An initial question is whether defendant preserved what he is trying to raise now and whether his brief complies with the appellate rules. In the assignment of error itself, defendant first states that he called Dr. Cookson as an expert, and that Dr. Cookson could not say that [redacted] was using methamphetamine. (App Br 32). Defendant then states: "The parties later recorded the objection and offer of proof outside the jury's presence as follows: [questioning from 11/3 Tr 1-3]." (App Br 32). The assignment of error contains the offer of proof itself; it lacks the initial objection and ruling that caused the offer of proof. The appellate rules require a verbatim rendition of each ruling challenged. ORAP 5.45(4). Perhaps defendant is challenging the ruling that created the necessity of the offer of proof, or perhaps he is challenging the non-admission of testimony elicited during the offer of proof.

At any rate, if the challenge is preserved and presented properly, it should not lead to reversal of defendant's convictions. This entire assignment of error rests on a misunderstanding of the testimony and the circumstances. [redacted] never said that the rope

was any kind of monster, so obviously the expert should not have been asked whether such a statement would indicate methamphetamine abuse, and no issue of the basis for any expert opinion exists. In addition, even if [redacted] had made such a statement, the expert went on to say that the described behavior could be caused by nonspecified drug use, but also said that the behavior would not be unusual for someone who had just been assaulted.

The subject actually arose before Dr. Cookson's testimony. The sergeant, describing [redacted]'s appearance, compared the rope to a snake and a monster to help others understand what the officer believed [redacted] was feeling:

> She had a rope around her ankle when I arrived. And when I went back to contact her she looked down at the rope and she started shaking her ankle and screaming for it to get off, like it was, like, some serpent crawling up her leg or some monster or something.
>
> And I had one of the people in the crowd — they asked me if they could untie it off her leg. And I told them to go ahead and take it off her leg. Obviously, it was causing her a lot of terror.

(Tr 377).

On cross-examination, defense counsel asked the sergeant about the language in his report:

> In your report you describe [redacted] as screaming for the rope to be removed, looking at the rope with a terrorized expression on her face, violently kicked her leg (ankle) in the air as if the rope were some sort of terrifically terrible monster crawling up her leg.
>
> A: Yes, sir. That's correct.
>
> Q: Is this an indication of a person who is under the influence of a drug?
>
> A: Boy, it would be really difficult to give you an opinion on that because —

Q: Could it be?

A: It — it could be. I can — I can tell you that.

(Tr 390-91).

Later, when Dr. Cookson was testifying, defense counsel started a hypothetical: the prosecutor objected, saying that the question was speculative. (Tr 475). The judge excused the jury, and defense counsel asked two questions and the judge sustained the prosecutor's objections. (Tr 476-78).

In front of the jury, on cross-examination, Dr. Cookson volunteered that the marks on [redacted]'s neck did not appear to be from a rope, but rather from a contusion or blow. (Tr 487). He said he would give a great deal of consideration to a report by an emergency room nurse about the age of injection sites. (Tr 490). The doctor continued:

> And — and one other comment too. I'm sorry — I may have been incomplete in my answer to your earlier question when you asked me about the behavior of the individual.
>
> The only thing that would be very uncharacteristic of a frightened person would be to miss — or — or — or to think that a — and I believe you mentioned this earlier — that she thought that the — she thought that the — that the ligature of the rope around her leg was something other than a rope.

Q: No, that — that's not — that — I didn't say that.

A: Oh.

Q: I believe that came from Counsel's mouth. And I don't believe there's been any testimony that she thought it was a —

A: Okay. Fine.

Q: So, no, that's not evidence in this case.

A: I see.

(Tr 490-91). Dr. Cookson, still in front of the jury, agreed that a brutal assault could cause strange behavior. (Tr 491). He said that he could not tell whether [redacted] was under the influence of drugs, and he would give the emergency room nurse's opinion a high degree of credence. (Tr 492). On redirect examination, he said that [redacted]'s shoulder injury could have been caused by landing on the roof, but the neck injury was consistent with a contusion or blow delivered directly to the neck one way or the other. (Tr 494).

At that time the jury was excused, and defense counsel continued with another offer of proof, this time quoting the police report saying that [redacted] had a terrorized look on her face "as if the rope was some sort of terrifically terrible monster crawling up her leg" and asking Dr. Cookson whether "that could be a symptom or indication" that [redacted] was under the influence of methamphetamine. (11/3 Tr 1-2; App Br 32). The doctor said he had no difficulty in characterizing that as abnormal behavior, but could not say it was specific to a user of methamphetamine. (11/3 Tr 2; App Br 32). When the prosecutor made it clear that it was the police officer rather than [redacted] who made the statement, the doctor said he would not have the same opinion. (11/3 Tr 3; App Br 33).

The trial court properly did not allow the doctor to give an opinion about what might cause a woman to think that a rope was a monster because [redacted] never said that she believed that the rope around her ankle was a monster. It was the sergeant who created that image, evidently from his desire to communicate the fear he felt emanating from this woman. Whether the sergeant thought [redacted] was looking at the rope as if it were a monster, or it was a bouquet of roses, is irrelevant to any issue in this case.

However, even if [redacted] herself had said that she actually thought the rope was a monster, no harm was done by the exclusion of the doctor's opinion that such a view of a rope could be caused by drug use, because that same offer of proof indicated that any person who has been assaulted and had a rope tied around her leg would want the rope removed and would probably look and act the same way. (App Br 33).

Defendant misses the mark when he contends that this assignment of error concerns OEC 703 and "facts or data" that can support an expert's opinion. (App Br 34). In the first place, no similar argument was made in the trial court; defendant has no right to ask to have his convictions reversed on a theory never presented to the trial court. *State v. Martin*, 135 Or App 119, 897 P2d 1187 (1995). The doctor did not rest any opinion on the sergeant's report; in fact, he said that he could reach no opinion about [redacted]'s possible drug use. The prosecutor called the sergeant's colorful language an "inference." More precisely, it was a descriptive phrase — it was neither a "fact" nor any part of "data." If [redacted] had called the rope a snake or monster, Dr. Cookson might well have been asked if that sort of mistake could have been a symptom of methamphetamine use. That did not occur, though. Rather, [redacted] kicked her leg in a fashion that the sergeant imagined might be similar to someone who thought a rope was a monster. Since no fact or data was present here, OEC 703 is wholly irrelevant.

Defendant contends that the error prejudiced him. (App Br 37). Even if he were absolutely right about everything else in his brief, he is wrong about this. Evidently he believes that Dr. Cookson should have been allowed to say that [redacted]'s reaction to the rope could have been caused by drug use. As set out above, an officer already gave exactly this

testimony to the jury. (Tr 390-91). In addition, Dr. Cookson also said that an assault could cause this reaction. The state claimed that defendant assaulted the victim in various ways and defendant thought that somehow [redacted]'s drug use explained all of her reactions. Since Dr. Cookson opined that either scenario could have caused [redacted]'s behavior, his testimony would have had no effect on the final decision by the jurors. The error, if any, in excluding this evidence must have been harmless.

Defendant argues that the doctrine of cumulative error is alive and well in Oregon, citing *State v. Bonner*, 241 Or 404, 408, 406 P2d 160 (1965), and *State v. Amory*, 1 Or App 496, 502-03, 464 P2d 714 (1970), and contending that this error, combined with errors found in his next two assignments of error, amount to reversible error. (App Br 37). In all three instances defendant contends that the trial court erred by excluding evidence he wanted to present. Neither *Bonner*, a case concerning jury instructions, nor *Amory*, a case concerning prosecutorial misconduct, were similar situations. However, since this "error" led to exclusion of evidence that would not have advanced defendant's theory of the case, this court need not decide whether the doctrine of cumulative error applies when the error is only evidential. Surely the exclusion of this testimony by the expert could not require reversal of defendant's conviction.

ANSWER TO ASSIGNMENT OF ERROR NO. 3 & 4

The trial court properly excluded evidence from bartenders about past bad acts of the victim.

ARGUMENT

Under these assignments of error, defendant contends that two bartenders should have been allowed to testify that the victim had in the past "hustled men for drinks." (App Br 37). Because the prosecutor had concerns about this type of testimony, defense counsel initially presented the evidence from these witnesses outside the presence of the jury. (11/3 Tr 5). Flansberg, a bartender from the Anchor Bar, was asked about her experience with [redacted] hustling drinks before or after the event. (11/3 Tr 11; App Br 37).[4] The prosecutor objected because the "hustling activity" was irrelevant, inadmissible character evidence, and prejudicial. (11/3 Tr 12). Defendant assigns this ruling as error. Defendant argues that the trial court also committed reversible error when it excluded evidence that the victim had "hustled men for drinks at the Moby Dick bar," (App Br. 38). The witness here was Dee Borden, who testified that [redacted] was asked to leave the bar for asking strangers for money. (11/3 Tr 15-17). Defense counsel argued that this evidence showed that [redacted] "had knowledge, and — about hustling men for drinks. That she had a plan to hustle the defendant in this case for money." (11/3 Tr 17). The trial court ruled that the evidence was inappropriate and inadmissible. (11/3 Tr 17).

These rulings were correct. [redacted] was not on trial, and no criminal trial should put the victim of the crimes under a microscope. Furthermore, defendant's theory that this evidence would show [redacted]s "knowledge" simply did not make sense. Any young woman who has been to a bar knows that a young woman does not need to pay for her own drinks.

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[4] Defendant worries on appeal that his offer of proof might have been inadequate as to Flansberg. (App Br 49-50). The prosecutor's motion in limine provided the missing portions of the defendant's offer of proof. (Rec 34-46).

The fact that some men will buy drinks for women in a bar is not a secret sort of specialized knowledge.

Defendant said that this evidence would be admissible to show [redacted]'s plan to hustle this defendant for money. However, the evidence was clear that [redacted] had already accepted money from defendant for the poker machine. The fact that this was not the first time that she had accepted money from a man she had recently met was not relevant to defendant's guilt. Defendant himself testified under oath that he did not buy [redacted] anything to drink in the bar; the fact that other men at other times bought her drinks would not make it more likely that the jurors would decide that the state failed to prove that defendant was guilty of these crimes.

Defendant also said that the evidence would be relevant to prove [redacted]'s intent. He fails to ever finish that thought -- intent to do what? A criminal trial seldom centers on the intent of the victim, even though the intent of the defendant might be an issue if there is a question of self-defense or accident or something like that. Defendant's unspoken assumption appears to be that any woman who would accept something from a stranger in a bar probably is a prostitute and the bar hustling is always a prelude to prostitution. If this is his theory, it is completely unsupported by evidence from this case or by common sense. Furthermore, even if that were true, it still would not go to defendant's guilt or innocence on the only charges at issue here. Such evidence might have been relevant on the kidnapping charge that was based on the theory that defendant used guile and deception to cause [redacted] to accompany him to his motel room; evidence that [redacted] was trying to get something of

value from defendant would have made it less likely that deception was necessary. However, defendant was acquitted of that charge. (App Br 1).

"Hustling" was a central theme in defense counsel's closing argument:

> Real or not — maybe it was only imagined, but [redacted] lives in a world of danger, in a world where she is hustling men for money, a dangerous business, and a world in which she is involved seriously in drugs, another dangerous business.
>
> * * * * *
>
> [When she opened the window] She — she was providing herself a way to get out, an escape. In case things went weird in the process of hustling this guy for money, and for some reason she couldn't get out of the door or otherwise, she had a second way to get out. That's perfectly reasonable for a paranoid methamphetamine addict. Okay?

(Tr 589).

> When [redacted] was married to [redacted] she was evidently not a methamphetamine addict. She was evidently not a person who hustled men for money for her drugs.

(Tr 628). Even though these accusations were unsupported by evidence, the prosecutor did not object. Defendant had already introduced enough evidence about the victim's past for his theory of the case — no more was necessary. More evidence on this subject was not "crucially important for defendant to present." (App Br 48).

On appeal, defendant continues to argue that the evidence was relevant to show [redacted]'s "plan" to get money from defendant. (App Br 42). Hustling for money in a bar is not equivalent to leaving the bar to hustle money in a motel room. In addition, even though defendant's witness testified that defendant said that he had money at his motel, defendant himself testified under oath that he only had about $10. Defendant did not testify that he bragged about having money to impress [redacted]. Thus, if the jurors actually believed

defendant in his sworn testimony, they would have concluded that the bartender was wrong when she thought she heard him saying he had money in the motel room. Only by disbelieving defendant on this point would they have any reason to consider [redacted]'s "plan."

Defendant also says this evidence was "plainly relevant to non-character purpose: to show that [redacted] intended and planned to get money from defendant when she met him at the Anchor." (App Br 42). Since [redacted] accepted money for the poker machine and accepted the dinner invitation, jurors knew that [redacted] had decided to accept gifts from defendant. Whether she made this decision before or after she walked into the bar was irrelevant. No evidence was introduced that [redacted] would "hustle" every man in a bar. Defendant's theory would support the introduction of every single time that a defendant touched a woman inappropriately into a sexual abuse case "to show that the defendant intended and planned to get" sexual pleasure from the woman. Certainly no criminal defendant or criminal attorney would ever agree that such evidence would be admissible. A man charged with rape cannot show that the victim had a "habit" of trading sex for drugs. *State v. Thompson*, 131 Or App 230, 884 P2d 574 (1994), *rev den* 320 Or 508 (1995). So, too, a man charged with kidnapping, attempted rape, and assault in a motel room should not be allowed to show that in the past the victim took free drinks from other men in bars.

Defendant considers other cases in which prior bad acts were admissible to show "intent," and concludes those cases support the admissibility of the evidence here. (App Br 43-46). However, strikingly in each of those cases, the intent in question was the defendant's and not the victim's, and the issue was the proof of the necessary mental state, an element of the crime. Were defendant to find a case in which the victim's intent was

relevant, his position would be more compelling. In addition, hustling men for drinks in bars is simply not the same as agreeing to prostitution and then becoming upset when the customer will not pay the demanded price. Even when the issue is intent, the prior act must be the same or similar to the charged crimes and the physical elements of the prior act *and* the present act must be similar; if the evidence fails any part of the test, it must be excluded. *State v. Pratt*, 309 Or 205, 211, 785 P2d 350 (1986); *State v. Johns*, 301 Or 535, 555-56, 725 P2d 312 (1986); *State v. Whitney-Biggs*, ___ Or App ___, ___ P2d ___ (4/16/97) (slip op at 34-36). Defendant's evidence fails both parts of the test.

If this court were to find the evidence relevant, reversal would not be required. The probative value of such evidence would be minor, and the prejudicial effect on the victim great. Defendant argues that he had already admitted so much negative evidence about the victim that "it could not have inflamed or distracted the jury to hear three pages of testimony which informed the jury that [redacted] hustled strange men for money in bars given what they already knew of her lifestyle and behavior on the date of the incident." (App Br 47-48). This is not the proper standard. A defendant who is successful in introducing evidence to tear down a victim does not then have carte blanche to introduce further embarrassing and prejudicial evidence, even if it is just "three pages of testimony." Defendant's argument supports the trial court's decision — a party has no right to introduce cumulative evidence.

The evidence against defendant was very strong. Defendant attempts to make this into a "credibility contest," but it was not. Although no other witness was in the room when defendant secretly confined [redacted] in the motel room, and no one watched him kiss her breast and threaten to kill her, this was not a "he said, she said" trial. Testimony from

several other people contradicted defendant's testimony and theory of the case and corroborated the victim's testimony. In his statement of facts, defendant notes that "[redacted] admitted she spoke [to] some other witnesses about the case but not in detail." (App Br 11). The evidence made it clear that none of the other witnesses knew [redacted] before the crimes, and no one spoke to her about the crimes before the trial itself. (Tr 213-14, 221-22, 244, 272, 296, 310).

Perhaps most compelling was the testimony from Sellinger and Weber. They heard defendant's threats before the crime, they saw him getting the rope with a "mean" look on his face, and they saw his unfriendly aspect in the parking lot. This evidence alone contradicts defendant's final story of a deal for prostitution gone bad when the meth-head hooker got mad because defendant would not pay her the $200 she needed for her fix that night. Certainly someone who had entered into a contract of money for sex would have no reason to threaten rape, and the letters in defendant's motel room suggest that he should have been excited rather than "mean-looking." While excitement over an anticipated sexual act might explain defendant's lack of friendliness in parking lot, it would do nothing to explain the repeated screams the men heard come from defendant's motel room. It could not explain why the men saw the door knob turning and the door itself going in and out. It could not explain the bumps and thumps the men heard from the room. Surely if defendant had actually screamed at [redacted] five or six times that he was not going to pay her $200, the men would have heard him, since by that time they were concerned enough that they called the police.

But even if Sellinger and Weber had not been available at the trial, other witnesses saw enough to discredit defendant's story and support [redacted]'s testimony. Five different people, again all strangers to both defendant and [redacted], were able to see [redacted] immediately after she jumped out of the window. Every single one of those witnesses concluded that the emotion [redacted] was expressing was fear. It was not anger at someone who failed to pay $200 for an act of prostitution; it was not disappointment at missing dinner; it was not retaliation or vengeance. Instead, it was plain fear — fear that was appalling and apparent. Even by the time the officers arrived, [redacted] exhibited a level of fear unequaled by others. Not a single observer thought the fear was anything but genuine. One would not expect someone "freaked out" on methamphetamine to retain professional-level acting skills. If [redacted] had really just been trying to get defendant "in trouble," as he suggested, surely she would have agreed with the onlookers when they told the police officer that defendant had pushed her out the window. But she did not. Instead, she corrected them, and told the officer that she had jumped.

Other evidence contradicted most of defendant's accounts of what happened and supported the verdicts. For instance, the bloody towel found in the living room of the motel was independent corroboration of [redacted]'s account of defendant hitting her in the nose, making it bleed, and then wiping her face. The bloodstains on the window sill also is strong evidence, especially in light of defendant's repeated denials during the taped interview that he had ever touched [redacted]. The fact that defendant put his shoes into his "laundry basket" and said that he was "taking off" gave lie to his story that he was going to drive away to wash his clothes. His comment to Weber that [redacted] got what she deserved is strong

evidence that his later stories are false. The sweat that the officer saw on defendant was consistent with an assault and inconsistent with sitting around, talking and drinking beer. The testimony by the emergency room nurse negated defendant's theory that [redacted] was under the influence of drugs. If a juror believed defendant's testimony about [redacted] possessing drugs in her purse, the juror would then reject his theory that it was [redacted]s desperation for drugs that drove her behavior.

One of the weakest aspects for defendant is the lack of any motive for [redacted] to lie about what happened, while defendant's motive is obvious. Defendant himself suggested that [redacted] was acting out of anger, but few people will risk their lives the way [redacted] did out of simple anger, and still be able to tell a coherent and consistent story. Defendant, on the other hand, failed to tell a consistent story. His first stories were very like [redacted]'s sworn testimony — that they met in the bar, he invited her out in dinner in Lincoln City, she accepted, they got her bag from a friend, bought some beer, and drove to the motel. For some reason, defendant felt he had to change that story, so at trial he said he never promised [redacted] dinner in a restaurant, they looked for her bag in the restaurant, and they did not go to the store for beer. No explanation is readily apparent why defendant would lie about these details the first time he talked to the police. Yet he would now have the jurors believe that each of these first statements to the police was false.

The same is true of the next part of his statements. First he said that [redacted] stripped completely naked before the shower; later he said she just took off her top. Yet independent evidence showed that [redacted] was not the sort of woman to chose to be naked in front of men, even men she knew well. Sometimes defendant said the motel door was open,

sometimes he said it was closed, sometimes he said it was unlocked, and sometimes he said it was locked. The request for $200 for kinky sex did not come up until his third story, and the drug theory did not emerge until trial. In the interview, defendant did not talk about a light slap, or muffling [redacted]s screams — he said he never touched her. Although defendant suggested that they agreed to have sex, he never said that he had agreed to pay for an act of prostitution, or that he had paid her any money; indeed, it is likely that he could not do so, since he was so clear during the taped interview that he only had $8.

The jurors also had the medical evidence about the contusions to [redacted]s neck and the marks on her ankle. Defendant's theory that [redacted] injured her neck when she jumped onto the roof is negated by the evidence, and he has no theory about why she would have marks on her ankle, since he testified that the rope was always loose and told the officers repeatedly that they would not find a mark on [redacted]

During his closing argument, defense counsel speculated that [redacted] was anticipating earning $50 for the sex act, and said that when "kinky" sex was discussed, she raised her price to $200. (Tr 581). However, he was also clear that defendant only had $10. (Tr 586). Thus, defendant's entire theory rests on an inconsistency. The jurors would have to accept the idea that defendant would promise to pay [redacted] money that he did not have for an act of prostitution. Defense counsel argued that [redacted] was upset when defendant refused to pay her $200 because she was not going to get her drugs. (Tr 587-89). This ignores defendant's testimony that [redacted] had drugs in her purse. Defense counsel strongly relied on the testimony by two officers who said that they could not see makeup on [redacted]s face; he reasoned that [redacted] lied about makeup, so she lied about everything. (Tr 593-94). If

defense counsel had remembered [redacted]s testimony about defendant wiping her face after hitting her, and the presence of the bloody towel exactly where she said it would be, he would not have mentioned the men's testimony about not noticing makeup.

On appeal, defendant attempts to make a constitutional argument. (App Br 48-49, 51). No constitutional argument was made in the trial court; his present argument was not preserved and cannot be considered. *State v. Castrejon*, 317 Or 202, 212, 856 P2d 616 (1993); *State v. Jensen*, 313 Or 587, 598-99, 837 P2d 525 (1992).

Defendant argues that [redacted]s story "bordered on the incredible" in that [redacted] stayed in the room even though defendant had said he would tie her up. (App Br 52). [redacted] explained that she did not believe defendant was really a danger to her. She explained that she will pay for her mistake for the rest of her life. While not sensible, [redacted]s actions are understandable. She showed too much trust; defendant's crimes against her have probably guaranteed that she will never make that mistake again. [redacted]s accounts, though, are consistent over time and consistent with the physical evidence. In contrast, none of defendant's many stories is credible. Even if a person believed that [redacted] demanded a lot of money, and because of her drug use became hysterical when defendant slapped her, her later actions are "incredible" under defendant's theory.

ANSWER TO ASSIGNMENT OF ERROR NO. 5

The trial court properly sentenced defendant.

ARGUMENT

Defendant argues that his sentence on the first degree sexual abuse conviction is improperly long. He concedes that his conviction was one addressed by Ballot Measure 11,

but argues that the measure violates both the state and federal constitutions because it imposes disproportionate sentences, relying on sentences for murder and aggravated murder for juveniles, while at the same time noting this court has rejected exactly the same claim in *State v. Lawler*, 144 Or App 456, 927 P2d 99 (1996), and refused to consider it in *State v. Parker*, 145 Or App 35, 929 Or 327 (1996), *rev den* 324 Or 654 (1997), and *State v. Jackson*, 145 Or App 27, 929 P2d 323 (1996), *pet rev pending* (1997). (App Br 55-56). He gives no good reason to reconsider any of these three cases. No error occurred in defendant's sentencing.

Furthermore, even without measure 11, the judge would have imposed a lengthy sentence for defendant. He noted that he came very close to departing on either the kidnapping or the sexual abuse convictions. (Tr 707). "The defendant's conduct over a lifetime has been particularly abhorrent, very violent, very much in contempt of weaker people, particularly women." (Tr 707). He noted that defense counsel argued that defendant was getting older:

> Well, that's true. If the conduct had changed and there had been a significant gap, I suppose that would be all right. But the conduct has continued on. The drinking, the total lack of concern for the victims — I find he's an extreme danger to society and, thus, the 195 months sentence; thus, the reason for making the two significant felony categories consecutive, substantial and compelling reasons to do that for the protection of the public. Sixteen plus years will put him up there into his 70's. Hopefully he will slow down a little bit.
>
> As to any significant rehabilitation, I don't think that Mr. Fowler has it in him. I don't think he's got the guts. Maybe somewhere along the line he indicated he was dealing with some people from the church. And maybe you'll find the church will give you some basis to set a platform to respect others' rights. You certainly haven't in the past and I don't think you care for anybody's rights but your own.

> And just the way you treated that individual showed you had an utter disgust for her rights, or utter contempt. And with that, society doesn't need you around.

(Tr 708-09).

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

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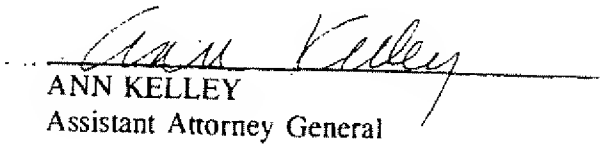

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